

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

JASON F.,

Plaintiff,

v.

Civil Action No.
3:19-CV-1355 (DEP)

ANDREW SAUL, Commissioner of Social
Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

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FOR DEFENDANT

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DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff

seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. § 405(g), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on December 23, 2020, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

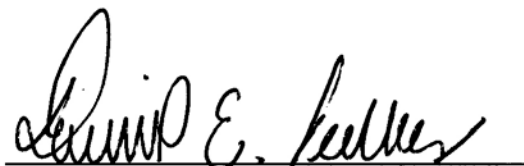
ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is
GRANTED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: January 8, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
JASON F.,

Plaintiff,

vs.

3:19-CV-1355

ANDREW SAUL,
Commissioner of Social Security,

Defendant.
-----x

Transcript of DECISION - December 23, 2020

HONORABLE DAVID E. PEEBLES

United States Magistrate Judge, Presiding

APPEARANCES (by telephone)

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1 THE COURT: Thank you, Counsel, for your excellent
2 presentations. I enjoyed working with you. I found this to
3 be an interesting case.

4 The plaintiff commenced this action pursuant to 42,
5 United States Code, 405(g) to challenge an adverse
6 determination of the Commissioner of Social Security finding
7 that plaintiff was not disabled at the relevant times and,
8 therefore, ineligible for the disability insurance benefits
9 for which he applied.

10 The background is as follows: Plaintiff was born
11 in April of 1981. He is currently 39 years of age.
12 Plaintiff was 34 years old at the onset of his alleged
13 disability in January of 2016. Plaintiff lives in a house in
14 Vestal, New York, with his mother and two dogs, which he
15 cares for. Plaintiff's mother has significant medical
16 issues.

17 Plaintiff stands approximately 6-foot 4-inches in
18 height, and at various times has weighed between 400 and
19 450 pounds; 450 pounds appearing at page 371 of the
20 Administrative Transcript.

21 Plaintiff has a high school education and one
22 semester of college education. He dropped out of college for
23 medical reasons. While in school he was in regular classes.
24 As a senior in high school, plaintiff suffered a trauma when
25 his father died in his arms in his senior year in 2000. He

1 required counseling after that event.

2 Plaintiff has a driver's license. Plaintiff
3 stopped working apparently in June of 2016, according to
4 page 45 of the Administrative Transcript, his hearing
5 testimony, and his statement to Dr. Moore. He testified and
6 has stated that he has looked for and applied for work since
7 that time; the reference is page 48 and 236 of the
8 Administrative Transcript. Plaintiff has held several
9 positions in the past. He was a health care driver from
10 April of 2001 to April of 2009. In the summer of 2008 he was
11 a corrections officer. In the summer of 2009 he worked as an
12 auto detailer. In the winter of 2009 to the spring of 2010
13 he was a supervisor in a fire and water restoration service
14 office. And from April of 2011 until June of 2016, he worked
15 as a paper delivery person driving in his car for up to two
16 hours delivering papers. According to plaintiff's statement
17 to Dr. Moore, that employment ended when his contract expired
18 and the newspaper downsized. He also stated to Dr. Moore,
19 however, that he could no longer physically carry out the
20 responsibilities of that job.

21 Physically, plaintiff suffers from back pain that
22 radiates into his legs bilaterally and results in numbness
23 and tingling. He suffered from a pars defect, which is also
24 known as spondylolysis, which was surgically repaired on
25 March 31, 1999 through an open reduction and fixation with a

1 bone graft. He also suffers from an L5-S1 lumbar issue.
2 There was a magnetic resonance imaging testing of his lumbar
3 spine on June 30, 2016, that appears at page 257, which notes
4 that, "The MRI does show L2-L3 severe disc space collapse and
5 near auto-fusion anteriorly. There is no significant
6 stenosis. There is also evidence of advanced discogenic
7 changes L5-S1 without herniation. The remaining disc spaces
8 appear to be within normal limits." There is also notation
9 on that page that plaintiff ambulates without difficulty and
10 that the plaintiff was advised to lose weight and is not a
11 surgical candidate.

12 The plaintiff also underwent an X-ray of his lumbar
13 spine on April 24, 2018, that's at page 366 through 368,
14 which reflected mild L5-S1 disc space narrowing. A pelvic
15 X-ray also taken on that date, at page 367, appears normal.
16 The plaintiff underwent nerve blocks on June 27, 2016 and
17 September 25, 2016.

18 Physically, he also suffers from bilateral knee
19 issues, worse on the left side. Plaintiff underwent physical
20 therapy from January of 2017 to February of 2017, for his
21 knees primarily. The records of that physical therapy are
22 reflected in 7F. He also suffers from obesity,
23 hyperlipidemia, hypertension, he experienced a broken hand in
24 or about 2001, allergies, and neck pain. Plaintiff does not
25 require any assistive devices.

1 Mentally, plaintiff suffers from depressive
2 disorder, panic disorder, and anxiety. The Agency's
3 consultative examiner, Dr. Mary Ann Moore, also diagnosed
4 plaintiff as suffering from post-traumatic stress disorder,
5 or PTSD, although I note that plaintiff's treating
6 psychologist, Dr. Lister, doesn't appear to have listed that
7 as a recognized diagnosis.

8 Plaintiff does obtain primary medical care from UHS
9 Primary Care, principally through Physicians Assistant Gina
10 Callahan and Nurse Practitioner Cori Pane. He has also
11 treated with Orthopedic Associates, Dr. Eric Seybold, who saw
12 him in 1998 and 1999 concerning the pars defect, and again
13 four times between April 13, 2016 and September 15, 2016 for
14 plaintiff's back issues, lumbar back issues, lower lumbar
15 back issues, I should say. He also has treated with Oakdale
16 Psychology Associates, primarily with Dr. Michael Lister, a
17 psychologist, since January 16, 2017, and he receives
18 cognitive behavioral therapy from Dr. Lister.

19 Plaintiff has been prescribed various medications
20 over time, including Gabapentin, Meloxicam, Zoloft,
21 Neurontin, Vistaril, and medical marijuana.

22 Plaintiff has a fairly robust range of activities
23 of daily living, reflected at pages 261 and 270 to 271 of the
24 Transcript, as well as in his hearing testimony. The
25 plaintiff is capable of showering, he can dress, cook, clean,

1 do laundry, care for and walk his dogs, read, socialize with
2 friends, visit family, use the internet. He plays video
3 games. He races radio controlled cars with friends. And he
4 is a competitive pistol target shooter and a member of a
5 shooting club. Plaintiff never smoked.

6 Procedurally, plaintiff applied for Title II
7 benefits under the Social Security Act on September 5, 2016,
8 alleging an onset date of January 20, 2016. At page 170 he
9 alleges disability based on a back injury, overweight, bad
10 knees, back pain, nerve damage to the back, and nerve damage
11 to the right leg. A hearing was conducted on August 3, 2018,
12 by Administrative Law Judge David Romeo with a vocational
13 expert to address plaintiff's application for benefits.

14 On November 8, 2018, ALJ Romeo issued an
15 unfavorable decision. That became a final determination of
16 the Agency on October 9, 2019, when the Social Security
17 Administration Appeals Council denied plaintiff's request for
18 review. This action was commenced on November 4, 2019 and is
19 timely.

20 In his decision, ALJ Romeo applied the familiar
21 five-step sequential test for determining disability. He
22 first noted preliminarily that plaintiff was insured through
23 December 31, 2020.

24 At step one, the Administrative Law Judge concluded
25 that plaintiff has not engaged in substantial gainful

1 activity since January 20, 2016, but noted that whether
2 plaintiff's paper route was viewed as SGA would not affect
3 the outcome, and he further noted that he has considered the
4 ability to perform that work in crafting his residual
5 functional capacity, or RFC, determination.

6 At step two, ALJ Romeo concluded that plaintiff
7 does suffer from severe impairments that impose more than
8 minimal limitation on his ability to perform work functions,
9 including degenerative disc disease and degenerative joint
10 disease of the lumbar spine, status post pars defect surgery,
11 anxiety, panic disorder, depressive disorder, morbid obesity,
12 and cannabis use disorder.

13 At step three, ALJ Romeo concluded that plaintiff's
14 conditions do not meet or medically equal any of the listed
15 presumptively disabling conditions set forth in the
16 Commissioner's regulations, specifically considering listing
17 1.04 and the other 1.00 listings related to the spine, 11.00,
18 14.00, 12.04, 12.06, and 12.15. He also considered
19 plaintiff's obesity in accordance with Social Security Ruling
20 02-01p.

21 The Administrative Law Judge next determined that,
22 notwithstanding his conditions, plaintiff retains the ability
23 to perform sedentary work, with the exception that physically
24 he can occasionally balance, stoop, kneel, crouch, crawl,
25 climb ramps and climb stairs; cannot climb ropes, ladders or

1 scaffolds. In light of his mental conditions, plaintiff can
2 understand, remember and carry out simple instructions and
3 make simple work-related decisions, and can tolerate a low
4 level of work pressure defined as work not requiring
5 multitasking, detailed job tasks, significant independent
6 judgment, very short deadlines, teamwork in completing job
7 tasks, or more than occasional changes in the work setting.

8 Applying that RFC finding at step four, the
9 Administrative Law Judge concluded plaintiff is incapable of
10 performing his past relevant work as a home restoration
11 service cleaner and as a driver.

12 At step five, the Administrative Law Judge
13 initially noted that if plaintiff could perform a full range
14 of sedentary work, the Medical-Vocational Guidelines, or the
15 so-called Grids, would direct a finding of no disability.
16 Because of additional limitations restricting the job base on
17 which the Grids are predicated, he resorted to the testimony
18 of a vocational expert and concluded based on that testimony
19 that, notwithstanding his limitations, plaintiff is capable
20 of performing available work in the national economy, and
21 cited representative occupations, including elections clerk,
22 credit card call out operator, surveillance monitor, and tube
23 operator. And, therefore, found that the plaintiff was not
24 disabled at the relevant times.

25 The Court's function in this case is to determine

1 whether correct legal principles were applied and the
2 resulting determinations are supported by substantial
3 evidence, which is defined as such relevant evidence as a
4 reasonable mind would find sufficient to support a
5 conclusion. The Second Circuit has noted in *Brault versus*
6 *Social Security Administration Commissioner*, 683 F.3d 443,
7 that this is an exacting and highly deferential standard.
8 And the Court went on to note in *Brault* that under this
9 substantial evidence standard, once an ALJ finds a fact, that
10 fact can be rejected only if a reasonable fact-finder would
11 have to conclude otherwise.

12 In this case, the plaintiff has raised four basic
13 contentions, some of which are interrelated. He contends
14 that the residual functional capacity is not supported by
15 substantial evidence in that he cannot meet the sitting
16 requirements and the work pace and attendance demands of
17 work.

18 Secondly, he challenges the rejection of the
19 treating source opinions of Dr. Seybold and Dr. Lister, and
20 challenges the mental components of the residual functional
21 capacity finding as well.

22 And lastly, plaintiff argues that the step five
23 determination is flawed due to the errors in the residual
24 functional capacity and the hypothetical that was posed to
25 the vocational expert.

1 The first task, as you know, in a case of this
2 nature is for the Administrative Law Judge to determine
3 plaintiff's residual functional capacity, something that is
4 pivotal to the remainder of the analysis. The claimant's RFC
5 represents a finding of the range of tasks he is capable of
6 performing notwithstanding his impairments, and is informed
7 by consideration of all of the relevant medical and other
8 evidence; 20 CFR Section 404.1545(a)(3).

9 Of course, as is true of any portion of the
10 disability finding, the residual functional capacity must be
11 supported by substantial evidence. The plaintiff was found
12 capable of performing a full range of sedentary work subject
13 to additional limitations. Sedentary work is defined under
14 20 CFR Section 404.1567 as involving "lifting no more than
15 10 pounds at a time and occasionally lifting or carrying
16 articles like docket files, ledgers, and small tools.
17 Although a sedentary job is defined as one which involves
18 sitting, a certain amount of walking and standing is often
19 necessary in carrying out job duties." The regulation has
20 been clarified by a subsequent ruling such that sedentary
21 work involves periods of standing or walking for no more than
22 two hours of an eight-hour workday and sitting up to a total
23 of approximately six hours in a similar period; SSR 96-9p and
24 SSR 83-10.

25 In this case, the residual functional capacity

1 finding was explained by the Administrative Law Judge at
2 pages 27 through 30 of the Administrative Transcript. In his
3 summary, which appears at 30 to 31, the Administrative Law
4 Judge contends and finds that the RFC is supported by the
5 opinions of Dr. Jenouri, Dr. Moore, Dr. Seybold, Dr. Lister,
6 Dr. Juriga, objective medical evidence, and activities of
7 daily living.

8 In arriving at his opinion, the Administrative Law
9 Judge was required to evaluate opinions of two treating
10 sources, Dr. Seybold and Dr. Lister. Ordinarily the opinion
11 of a treating physician such as those two regarding the
12 nature and severity of an impairment is entitled to
13 considerable deference provided it is supported by medically
14 acceptable clinical and laboratory diagnostic techniques and
15 is not inconsistent with other substantial evidence. Such
16 opinions are not controlling, however, if they are contrary
17 to other substantial evidence in the record, including the
18 opinions of other medical experts, and conflicts that arise
19 in the form of contradictory medical evidence in a record are
20 resolved properly by the Commissioner under *Veino versus*
21 *Barnhart*, 312 F.3d 578.

22 In this case, there are two opinions from
23 Dr. Seybold. The first was issued on January 13, 2017, and
24 appears at pages 293 to 295 of the Administrative Transcript.
25 Significantly, there is no question that it is more limiting

1 than the residual functional capacity finding. It opines
2 that plaintiff can sit for only two hours in an eight-hour
3 workday and stand and walk for one hour each. It also opines
4 that plaintiff would be absent more than -- well, it says
5 tree times a month, but I'm thinking three times a month is
6 what that should read, at page 295.

7 There was a second opinion issued by Dr. Seybold on
8 June 9, 2017. It appears at page 317 and 318. It was on a
9 form that apparently came from an office in Broome County,
10 Office of Adult Career and Continuing Education Services,
11 Vocational Rehabilitation, and it does contain somewhat
12 arguably contradictory information, both internally and
13 certainly as opposed to the January 2017 opinion. It
14 indicates that plaintiff is capable of working up to 25 to 40
15 hours per week but is temporarily unemployable for four to
16 six weeks. On the second page it indicates in the verbal
17 summary, plaintiff has moderate spinal stenosis and he is
18 unable to stand, sit, walk or drive for extended periods of
19 time. That is quantified in a check-box grid to indicate
20 that plaintiff is limited to 50 percent walking, standing,
21 sitting, and other physical exertional actions.

22 The Administrative Law Judge discussed
23 Dr. Seybold's opinions at pages 29 to 30 and gave some weight
24 to the second believing that it shows improvement. The
25 Administrative Law Judge properly resolved the conflict

1 between the two, although, as I indicated, I'm not certain on
2 what Dr. Seybold based his finding, his apparent finding of
3 improvement, since he only saw the plaintiff four times and
4 all four of those were in 2016. Nonetheless, the
5 Administrative Law Judge also found he was persuaded by the
6 plaintiff's activities outside of work. The discussion of
7 Dr. Seybold's opinions is somewhat lacking in that it does
8 not specifically lay out, as most Administrative Law Judge
9 decisions don't, the so-called *Burgess* factors that need to
10 be evaluated, but the Second Circuit has noted that in
11 *Estrella versus Berryhill*, 925 F.3d 90, from the Second
12 Circuit 2019, that a slavish recitation of the *Burgess*
13 factors, if it is lacking, it is not necessarily fatal if
14 upon review of the entirety of the decision it is clear to
15 the Court that the treating source rule was not violated, and
16 I make that finding in this case.

17 Dr. Jenouri, Dr. Gilbert Jenouri, examined the
18 plaintiff and issued an opinion on October 14, 2016. That
19 appears at 261 to 266 of the Administrative Transcript. He
20 found that plaintiff has moderate to marked restriction in
21 walking, standing, and sitting long periods, bending, stair
22 climbing, lifting, and carrying. The Administrative Law
23 Judge gave great weight to Dr. Jenouri's opinions at page 28
24 to 29, except with regard to sitting, and he explained that
25 he rejected that limitation on sitting as inconsistent with

1 Dr. Seybold's description of plaintiff's improved condition
2 and with the claimant's narration of his pattern of work and
3 social activity. And these are, of course, proper
4 considerations.

5 I note that the determination with regard to the
6 physical RFC is supported by not only the medical source
7 statement of Dr. Seybold and Dr. Jenouri, but also treatment
8 notes. On December 7, 2016, plaintiff reported no pain in
9 his lumbar area; that's at 282. On January 3, 2017, he also
10 reported no pain; that's at 277. On February 7, 2017, he
11 reported no pain; that's at 351, and stated that he had begun
12 going to the gym. On March 27, 2017, he reported no pain;
13 that's at page 348. On June 27, 2017, reported no pain;
14 that's at 337 to 338. On April 13, 2017, he noted that he
15 had experienced some pain but it had improved; that's at
16 page 341. He also reported receiving relief from injections;
17 that's at page 329.

18 He stated to Dr. Jenouri at page 261 that pain was
19 caused by activities. It was noted that he drove to deliver
20 papers six months after his alleged onset date for two hours
21 or more. He had a very robust set of activities of daily
22 living, more so than most plaintiffs that we see, quite
23 honestly, and most involve sitting. The plaintiff underwent
24 conservative treatment and was found not to be a candidate
25 for surgery. I couldn't find any records of physical

1 therapy, although he was referred to physical therapy or aqua
2 therapy on October 9, 2017, by I believe PA Callahan, that's
3 at page 334. And on November 20, 2017, he reported going to
4 physical therapy, which was helping; that's at page 324.

5 When it comes to sitting, by the way, I do note
6 that the Second Circuit has cautioned that, quote, "The
7 regulations do not mandate the presumption that all sedentary
8 jobs in the United States require the worker to sit without
9 moving for six hours, trapped like a seat-belted passenger in
10 the center seat on a transcontinental flight." *Halloran*
11 *versus Barnhart*, 362 F.3d 28, 33 (Second Circuit 2004).

12 So, in sum, I find that the physical aspects of the
13 residual functional capacity finding is supported by
14 substantial evidence.

15 Turning to the mental, the treating psychologist,
16 Dr. Michael Lister, issued an opinion on June 6, 2017. It
17 appears at pages 319 to 321 of the Administrative Transcript.
18 He lists an Axis I diagnosis as panic disorder and
19 unspecified depressive disorder. He assigns a global
20 assessment of functioning, or GAF, score of 60, which under
21 the DSM-4, which of course has been superseded by the DSM-5
22 which no longer utilizes the GAF scale, nonetheless, it's at
23 the top of the 51 to 60 category which is defined as,
24 "moderate symptoms (e.g. flat affect and circumstantial
25 speech, occasional panic attacks) or moderate difficulty in

1 social, occupational, or school functioning (e.g. few
2 friends, conflicts with peers or co-workers)."

3 The opinion of Dr. Lister indicates only one rating
4 of poor in ability in the category of work and social
5 abilities, and that is to perform at a consistent pace
6 without an unreasonable number and length of rest periods.
7 It indicates at page 321 that plaintiff is ready to begin
8 employment and competitive employment, although it does check
9 the box for part time.

10 The Administrative Law Judge discussed Dr. Lister's
11 opinions at page 30. Dr. Lister clearly qualifies as a
12 treating source. But once again, I believe that the opinion
13 of Dr. Lister and the weight that it is given is adequately
14 explained on page 30 of the Administrative Law Judge's
15 decision and I don't find any violation of the treating
16 source rules. I believe that the requirements of *Estrella*
17 have been met.

18 The mental condition of the plaintiff is also
19 addressed by Dr. Mary Ann Moore, who examined the plaintiff
20 on October 19, 2016. Her opinions appear at page 368 to 373
21 of the Administrative Transcript. In her medical source
22 statement she finds some limitations, including significantly
23 moderate limitations in regard to appropriately dealing with
24 stress, relating adequately with others, making appropriate
25 work decisions, and maintaining a regular work schedule. The

1 opinion is given great weight, but the limitation on schedule
2 is rejected and explained as follows, "The moderate
3 limitations Dr. Moore describes concerning maintaining a
4 regular work schedule are not well supported in light of the
5 claimant's hearing testimony about his varied daily
6 activities and continuing job search, and consequently are
7 not adopted."

8 The opinion of Dr. S. Juriga from November 1, 2016
9 was also considered and given some weight at page 30 of the
10 Administrative Transcript. Dr. Juriga's opinions are
11 included in Exhibit 1A, which appears at 71 through 81 of the
12 Administrative Transcript. In his opinion, Dr. Juriga finds
13 that plaintiff does not have any limitations in the domains
14 of restriction of activities of daily living, difficulties in
15 maintaining social functioning, and repeated episodes of
16 decompensation, each of extended duration, and finds only
17 mild difficulties in maintaining concentration, persistence
18 or pace.

19 Of course, plaintiff's RFC as found by the
20 Administrative Law Judge does not mirror exactly any one of
21 the varied medical opinions in the record, but of course
22 there is no requirement that it do so. In this case, I find
23 that the analysis of the Administrative Law Judge was proper
24 and the portions of the medical opinions that were not
25 adopted were adequately explained. I was persuaded that this

1 is a case very similar in that regard to *Medina versus*
2 *Commissioner of Social Security*, 2020 WL 7418981. It was an
3 opinion, a summary order issued by the Second Circuit on
4 December 18, 2020.

5 The step five argument, of course, that was made by
6 the plaintiff is dependent on a finding that the residual
7 functional capacity determination was not supported by
8 substantial evidence, and I found that it was supported by
9 substantial evidence. The hypothetical posed to the
10 vocational expert mirrored the RFC finding. I, therefore,
11 conclude that the Commissioner has carried his burden at step
12 five and that the resulting determination was proper and
13 supported by substantial evidence.

14 I will, therefore, grant judgment on the pleadings
15 to the defendant and order dismissal of plaintiff's
16 complaint.

17 And leave you with a wish that you have a happy,
18 healthy holiday season and New Year. Let's pray that 2021
19 brings us back to normal. Thank you.

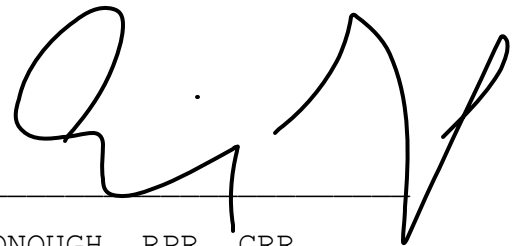
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C E R T I F I C A T I O N

I, EILEEN MCDONOUGH, RPR, CRR, Federal Official
Realtime Court Reporter, in and for the United States
District Court for the Northern District of New York,
do hereby certify that pursuant to Section 753, Title 28,
United States Code, that the foregoing is a true and correct
transcript of the stenographically reported proceedings held
in the above-entitled matter and that the transcript page
format is in conformance with the regulations of the
Judicial Conference of the United States.

A handwritten signature in black ink, appearing to be 'E. McDonough', written over a horizontal line.

EILEEN MCDONOUGH, RPR, CRR
Federal Official Court Reporter